

MB 03-206

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Exclusivity Agreements
Affecting Direct Broadcast
Satellite (DBS) Providers

To: The Commission

COPY
RECEIVED

AUG 19 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RECEIVED
AUG 20 2003
MEDIA DIVISION

**REQUEST FOR SECTION 403 INQUIRY AND
FOR DECLARATORY RULING**

Word of God Fellowship, Inc., dba Daystar Television Network ("Daystar"), by its attorneys, hereby requests that the Commission initiate an inquiry pursuant to Section 403 of the Communications Act, and to issue a Declaratory Ruling that contractual provisions which hinder a Direct Broadcast Satellite ("DBS") provider from fulfilling its Public Interest Obligations ("PIO") are against public policy and contrary to the public interest.

Authority

Section 403 of the Communications Act of 1934, as amended (47 U.S.C. § 403) grants the Commission broad authority to initiate an inquiry into any matter or question which may arise under any provisions of the Act or relating to the enforcement of any of the provisions of the Act.

Section 1.2 of the Rules (47 C.F.R. § 1.2) provides that the Commission, on motion or on its own motion, may issue a declaratory ruling terminating a controversy or removing uncertainty.

The Parties

Dominion Video Satellite, Inc. ("Dominion") is a FCC-licensed DBS provider, and a provider of religious-oriented programming under the "Sky Angel" trade name.

EchoStar Satellite Corporation ("EchoStar") is also a FCC-licensed DBS provider, using the trade name "DISH Network"

Daystar produces and distributes Christian and family-oriented programming to the public through its owned and operated broadcast stations, other affiliated broadcast stations, cable television systems and DBS providers.

Background

In 1996, Dominion and EchoStar entered into one or more agreements which provided, *inter alia*, that Dominion would have the exclusive right to provide Christian-religious programming on EchoStar's DISH Network, and EchoStar would have exclusive rights to carry other types of programming. In contrast to the prohibition of all other Christian religious broadcasting on the DISH Network and pursuant to such agreements which limit Christian religious programming exclusively to Dominion's subscribers, Dominion's Angel One channel (which is entirely or almost entirely Christian religious programming) is carried on the 119 degree CONUS satellite of DISH to all DISH subscribers, as an exception to the prohibition of such carriage of Christian religious programming on the DISH Network. Dominion's Angel One channel is a direct

competitor of Daystar with respect to both its viewers and its programmers. The DISH Network currently has over 8.5 million subscribing homes and the Dominion network currently has only approximately 0.150 million subscribing homes.

Daystar has entered into an agreement with EchoStar whereby EchoStar would carry Daystar programming for good and valuable consideration, including the forbearance of some of Daystar's owned and operated broadcast stations from exercising their "must carry" rights in areas where EchoStar is providing local-into-local service pursuant to Section 76.66 of the FCC Rules (47 C.F.R. §76.66). EchoStar intends carriage of the Daystar programming to be in partial fulfillment of its Public Interest Obligations. Daystar holds licenses from the FCC for "non-commercial educational" operation of its owned and operated television stations and unquestionably qualifies under the Public Interest Obligations as a qualified public interest programmer.

Dominion is seeking, and has obtained a preliminary injunction in a civil action in United States District Court, the grant of which prohibits EchoStar from carrying, and requires EchoStar to remove, the Daystar qualified public interest programming on the DISH Network, even if such removal would reduce the number of PIO channels on DISH below the required 4 percent level and even if there would be an insufficient number of qualified public interest programmers available to replace them. The preliminary injunction has been stayed pending appeal to the 10th Circuit Court of Appeals.

DBS Public Interest Obligations

Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), now codified as Section 335(b) of the Communications Act (47

U.S.C. § 335(b)) requires that a DBS provider reserve a portion of its channel capacity or not less than 4 percent nor more than 7 percent “exclusively for noncommercial programming of an educational or informational nature.”

In adopting rules under this requirement, the Commission concluded that the 4 percent limit should be adopted.¹ This obligation, sometimes referred to as a reservation requirement, is now codified at Section 25.701(c) of the Rules (47 C.F.R. § 25.701(c)). The *DBS Public Interest Order* looked sharply into the differences between the cable television industry (already fully established) and the DBS industry (“a relatively new entrant”). As a result, the Commission declined to impose some of the restrictions on DBS that had been imposed upon cable.

In the 1998 *DBS Public Interest Order*, the Commission concluded that the reservation requirement would apply notwithstanding existing programming contracts, and that DBS providers would have to make sufficient channel capacity available to fulfill the reservation requirements regardless of existing programming contracts.²

The Commission gave DBS providers reasonable discretion, within limits, to determine eligible programmers used to fulfill their reservation requirements.³ DBS providers cannot, however, exercise editorial control over the programming supplied by their PIO suppliers. The Commission did not, however, give the DBS providers

¹ *Implementation of Section 25 of the Cable Consumer and Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd. 23254 (1998) (*DBS Public Interest Order*)

² 13 FCC Rcd. at 23285-23286.

³ 13 FCC Rcd. 23293. The FCC specifically denied Dominion’s request to have religious programming set aside as a separate category.

discretion to refuse to carry a qualified public interest programmer when no other qualified applicants are available to satisfy the minimum 4 percent channel requirement.

Argument

In hearing testimony in one of the civil cases,⁴ Michael Schwimmer, Senior Vice President of Programming at EchoStar testified that the current number of channels required for the PIO reservation requirement was 23 channels. Mr. Schwimmer further testified that only a small minority of potential PIO programmers were other than religious or Christian.

Congress and the FCC have dictated that DBS providers set aside a certain percentage of their channel capacity for “national educational program suppliers”. This is a broad range of “noncommercial entities with an educational mission” “Thus, an entity with an educational mission that is organized under the tax code as a nonprofit corporation will be eligible as a national educational program supplier.”⁵

If a DBS provider enters into covenants which provide exclusivity to one type of national educational program supplier, it is quite likely that the reservation requirement could never be met. In the case of EchoStar, one covenant limits all other Christian programmers. Similar covenants could grant one DBS provider all health programmers, all history programmers, all news programmers, etc., thus eliminating such content from the available noncommercial educational programmers that could ever be used by the other contracting DBS party to fulfill its PIO obligations. This would give one DBS

⁴ *Dominion Video Satellite, Inc v EchoStar Satellite Corporation, et al and Word of God Fellowship Incorporated, Applicant in Intervention-Appellant*, U.S. Court of Appeals for the Tenth Circuit, Case Nos 03-1274, 03-1303

⁵ 13 FCC Rcd 23290-23291

provider the ability to unilaterally eliminate qualified public interest programmers from its DBS network by contracting the content to a smaller DBS provider or an affiliate DBS provider. As a result, the public would effectively be denied the ability to receive the public interest programming on the subject DBS network, and the DBS provider would be excused from compliance with the PIO rules. If the DBS providers entitled to enforce such content exclusions were inconsequentially small, as is Dominion, the public's interest in receiving the broad range of educational programming protected by the 1992 Cable Act and its implementation Rules would be defeated because the educational programs would not be available to any subscribers other than the few subscribers to the small provider. The public information file of EchoStar and the testimony of Mr. Swimmer at the Preliminary Injunction hearing in the current Dominion case demonstrate that: (1) the removal of Daystar and FamilyNet from the DISH Network, as required by the Preliminary Injunction that was granted, would reduce the number of PIO channels on DISH below the required 4 percent level, and (2) there is an insufficient number of available qualified public interest programmers under current application with DISH to replace them.

Section 73.658(a) of the Rules (47 C.F.R. § 73.658(a)) prohibits television stations from entering into agreements with a network organization which would prohibit the station from broadcasting the programs of another network organization. If a DBS provider is analogous to a television station, in that it transmits signals to the public (albeit on a subscription basis), the DBS provider should be prohibited from entering into

an agreement with a program supplier (i.e., Dominion) which prohibits the DBS provider from carrying the signals of another program supplier (i.e., Daystar).

In the cable television area, the Commission has adopted specific rules which prohibit certain specific practices which are deemed to be unfair or which have the effect of hindering multichannel video programming distributors from providing programming to subscribers or consumers. Section 76.1002 of the Rules (47 C.F.R. § 76.1002) requires prior FCC approval for certain types of exclusive agreements, and sets forth specific factors which the Commission must consider in determining whether such contracts are in the public interest.

In the *DBS Public Interest Order*, the Commission declined to impose on DBS providers many of the public interest requirements imposed upon cable operators because DBS coverage is largely national while cable is local, and because DBS was a relatively new entrant in the multichannel video market. Now, DBS providers are providing local into local service in many markets, and the industry is no longer in its infancy. While the DBS industry may not have advanced so far that the Commission should revisit the issue of other public interest factors, the Commission should examine at least the issue of exclusive contracts and their effect on permitting DBS providers to provide programming to subscribers and consumers.

The contractual provisions which Dominion is seeking to enforce would also prohibit EchoStar from carrying a Daystar affiliated full power television station in a market in which such affiliate exercised its must carry rights under Section 76.66 of the Rules (47 C.F.R. § 76.66). As noted above, part of the consideration for the

Daystar/EchoStar agreement is Daystar's forbearance from exercising its must carry rights in certain markets.

In this case, EchoStar is not seeking to carry Daystar programming in response to a must carry request, but in furtherance of the requirements imposed upon it by Congress and the Commission's rules requiring carriage of a certain number of noncommercial channels. The Dominion exclusivity provisions are preventing EchoStar from doing so.

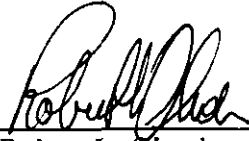
Prayer for Relief

Daystar respectfully requests that the Commission promptly initiate an inquiry pursuant to Section 403 of the Communications Act to collect whatever information it deems relevant and material, and to issue a declaratory ruling that agreements which have the effect of hindering DBS providers from fulfilling their Public Interest Obligations are against public policy and contrary to the public interest.

Respectfully submitted.

**WORD OF GOD FELLOWSHIP, INC.
d/b/a DAYSTAR TELEVISION NETWORK**

By: _____


Robert L. Olender
James A. Koerner
It's Attorneys

August 19, 2003

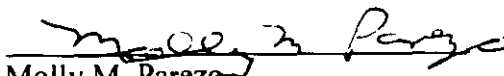
Koerner & Olender, P.C.
5809 Nicholson Lane
Suite 124
North Bethesda, MD 20852
(301) 468-3336

CERTIFICATE OF SERVICE

I, Molly M. Parezo, secretary at Koerner & Olender, P.C., do hereby certify that on this 19th day of August, 2003, I caused a copy of the foregoing "**Request for Section 403 Inquiry and for Declaratory Ruling**" to be served by first-class mail, postage prepaid, to the following:

Dominion Video Satellite, Inc.
3050 North Horseshoe Drive
Naples, FL 34104

EchoStar Satellite Corporation
90 Inverness Circle East
Englewood, CO 80112


Molly M. Parezo

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

- o This document is confidential (**NOT FOR PUBLIC INSPECTION**)
- o An oversize page or document (such as a map) which was too large to be scanned into the ECFS system.
- o Microfilm, microform, certain photographs or videotape.
- o Other materials which, for one reason or another, could not be scanned into the ECFS system.

The actual document, page(s) or materials may be reviewed (**EXCLUDING CONFIDENTIAL DOCUMENTS**) by contacting an Information Technician at the FCC Reference Information Centers) at 445 12th Street, SW, Washington, DC, Room CY-A257. Please note the applicable docket or rulemaking number, document type and any other relevant information about the document in order to ensure speedy retrieval by the Information Technician

1 Video